

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON. JUSTICE P.A. AKHIERO,
ON THURSDAY THE
26TH DAY OF MAY, 2022.

BETWEEN:

SUIT NO. B/138/2022

DR. EDWARD EDOSEGHE AISOWIEREN -- -- CLAIMANT/APPLICANT

AND

- 1. MR. NOSA ASORO***
- 2. MR. KINGSLEY AISOWIEREN***
- 3. MR. ALBERT ODIGIE***
- 4. MR. FRIDAY ODIGIE***
- 5. MR. ERHUNMWUNSE JOSEPH***
- 6. UDINYINWE IMAGBORO***

DEFENDANTS/RESPONDENTS

RULING

This is a Ruling on a Motion on Notice dated 3rd of February 2022, filed on the 11th of February, 2022 brought pursuant to Order 40 Rules 1, 2 and 3 of the Edo State High Court (Civil Procedure) Rules, 2018, and under the inherent jurisdiction of this Honourable Court.

By this application, the Claimant/Applicant is praying this Honourable Court for the following orders:

An Order of Interlocutory Injunction restraining the Defendants/Respondents, their agents, servants and or privies or howsoever called from further trespassing on or carrying out any developmental activities whatsoever or altering the structural character or topography or exercising any

form of possessory rights over the property with the structures thereon, on a parcel of land measuring approximately 100 feet by 100 feet, lying and situate at No. 9, Nitel Road, Off Sapele Road, Benin City, pending the hearing of the substantive suit.

And for such further order(s) as this Honourable Court may deem fit to make in the circumstances of this case.

The motion is also supported by a 26 paragraphs affidavit and a Written Address of the learned counsel for the Applicant.

At the hearing of the application, the learned counsel for the Claimant/Applicant **Prince C.B. Ogiegbaen** adopted his written address as his arguments in support of the motion.

In his written address, the learned counsel for the Applicant formulated a sole issue for determination, to wit:

“Whether this Honourable Court has the powers to grant the orders sought”

Opening his arguments on the sole issue for determination, learned counsel submitted that the principles governing the grant of an interlocutory injunction are as follows:

- 1. The party applying for an order of interlocutory injunction must show that there is a serious question to be tried and a legal right to be protected;***
- 2. That the balance of convenience is in favour of the Applicant;***
- 3. That the Applicant will not be adequately compensated by the award of damages; and***
- 4. That Applicant must give undertaking as to damages in the event that the order of injunction was wrongly made.***

In support, he cited the following decisions on the point: ***Agbogu v. Okoye (2008) All FWLR pt. 414 at pg. 1494 particularly at pg. 1497. See also the case of Akapo v. Hakeem Habeem (1992) 6 NWLR pt. 247 at pg. 266. Obeya Memorial Hospital V A.G Federation (1987) 3 NWLR pt. 60 at pg. 325.***

On the requirement of having a serious question to be tried and a legal right to be protected, counsel submitted that the legal rights of the Claimant/Applicant can be gleaned easily from paragraphs 2, 3, 6, 7 and 9 of the Claimant/Applicant’s affidavit in support of this motion and in Exhibit A.

He maintained that the Applicant copiously deposed to his position as the next Eldest or Senior Son from the second gate (urho) of the LATE PA. ALFRED OMOREGIE AISOWIEREN entitled to customarily inherit the subject matter of this suit in accordance with the Bini Customs and Usages for the inventory and sharing of the properties of non-hereditary traditional title holders and ordinary persons.

He referred to Exhibit “A” which is a Handbook on some Bini Customs and Usages for the inventory and sharing of the properties of non-hereditary traditional title holders and ordinary persons issued by the Bini Traditional Council on the authority of the Omo N’Oba Erediauwa, Oba of Benin of blessed memory which has been given judicial notice and pronounced upon by this Honourable Court in a plethora of authorities and by Appellate Courts including the Apex Court.

Counsel submitted that the current position of the law is that in order to prove that there is a legal right in an Application for interlocutory order of injunction, an Applicant need not establish a prima facie case, it is sufficient if he shows that there is a serious question to be tried or as often put a triable issue.

He posited that by paragraphs 4, 5, 14, 16, 17, 18 and 19 of the Claimant/Applicant’s affidavit in support of this motion, the Applicant has shown that the 1st Defendant with the support of the 2nd – 6th Defendants have mobilized thugs to the property under reference where the Claimant’s mother and siblings are still living and have proceeded to demarcate the said property into two halves and have sent notices to the tenants in the premises in preparation to start the process of erecting structures on the land which action would have the effect of permanently altering the structural character and topography of the land if not restrained by an order of this Honourable Court.

He referred to Exhibits “B1” – “B3” and Exhibits “C” and “D” which are attached to their affidavit which shows clearly the extent of trespass and demarcation/fencing already done by the 1st Defendant and his agents on the said property which the Claimant is customarily entitled to inherit including sending notices of change of ownership and a quit notice to one of the tenants in the premises.

Next, learned counsel posited that the balance of convenience is in favour of the Applicant because the property now in dispute has been one of the ancestral homes of his late father which he built and put himself, his mother and siblings in so that they can have a roof over their head twenty-two (22) years ago. He said that his mother and siblings are still living in the house.

He submitted that the Applicant and his gate stand to suffer more inconvenience if the Defendants are allowed to continue with their wanton act of decimation and alteration of the Structural Character and topography of the property as against the 1st Defendant who is a mere purchaser for value without notice or the 2nd Defendant who is the Claimant’s Eldest brother from the first gate (urho) and has since inherited their late father’s Igiogbe including other properties to the exclusion of other children.

He posited that the Applicant will not be adequately compensated by the award of damages if the Defendants are allowed to continue in their act of wanton trespass and decimation of one of the ancestral homes of the Claimant’s late father

which the Claimant is customarily entitled to inherit. He posited that the action of the Defendants can irreversibly alter the structural character of the said property if not restrained by an Interlocutory Order of this Court.

He submitted that where there exists a threat to the radical alteration or structural character or topography of a land, an order of interlocutory injunction will be appropriate in the circumstances to maintain the status quo pending the final determination of the competing rights of the parties. See the case of *Akpughunum v. Akpughunum (2007) All FWLR pt. 376 at pg 746 particularly at pg 784 ratio 3.*

He submitted that the status quo to be preserved is the status quo that existed before the illegal act of the 1st Defendant in forcibly entering Claimant/Applicant's property and demarcating same in readiness to demolish it including sending quit notices and notice of change of ownership to Claimant's tenants living in the premises. See *Agbogu v. Okoye (Supra) ratio 13.*

On the requirement of giving an undertaking as to damage in the event that the order of injunction was wrongly made, he submitted that the Claimant/Applicant has given an undertaking in paragraphs 24 of the affidavit in support of this motion

In opposition to this application, the Defendants/Respondents filed a Counter-Affidavit of 26 paragraphs and a written address of counsel.

In his written address, the learned counsel for the Defendants/Respondents *S.I. Okoror Esq.* formulated two issues for determination as follows:

- 1. Whether this honourable court can grant the relief of the applicant as contained in the application;***
- 2. Whether the Claimant/Applicant has satisfied the conditions for a grant of an order of interlocutory injunction.***

Thereafter, learned counsel argued the two issues seriatim.

ISSUE 1:

Whether this honourable court can grant the relief of the applicant as contained in the application.

Arguing this issue, learned counsel submitted that it is the law that injunctive orders cannot be made for already completed acts or acts which took place before the Court was approached. See the case of *Chief Weme Ogbumgbada V. Samuel Chinda Ogbumgbada & 3 ors (2018) 37 WRN 113 at 136-137. See also Etobom Ekpo Aabasi Out & Anor V. Etubom (Dr.) Anthony Asuquo Anio & ors (2013) LPERLR – 21405 (CA) 74-74.*

Counsel posited that the Elders of the Aisowieren family erected a fence demarcating the land measuring 50feet by 100feet and the 1st Defendant after purchasing the part demarcated issued letters to the occupiers. He said that the Defendants have not carried out further actions on the property and these actions were done and completed before this suit was filed. He said that the

Claimant/Applicant's allegation of a planned demolition are borne out of his imagination. He pointed out that Exhibits B1, B2, B3, C & D do not show that there is or about to be a demolition of the house. He said that it is not contained or suggested in the letters or pictures exhibited but was merely deposed to by the Applicant.

He said that such an assertion is baseless and amounts to mere speculation and this honourable Court would act only on facts backed by sufficient proofs. He therefore submitted that this application is seeking an order of injunction over acts or events which have already been done, completed, have happened and which took place before this honourable Court was approached for such reliefs and this Court.

Counsel posited that from the wordings of the prayer, the Claimant seeks to restrain the Defendants from further actions of trespass; carrying on of developmental activities ...on the land measuring approximately 100feet by 100feet. He submitted that the Defendants cannot be restrained from further acts of trespass where a finding has not been made by a Court of competent jurisdiction that the Defendants have carried out activities on the land which amount to trespass in the first place.

He submitted that this application is an invitation to delve at this interlocutory stage into questions meant for determination in the main case, and to grant the Application would mean to decide on the substantial part of the suit. He pointed out that one of the reliefs sought in the Statement of Claim- Relief 4- is one for an order of trespass. He said that the substance of relief 4 is in essence a declaration that the 1st defendant's act of entering the land and erecting the fence amounts to trespass. That by its wordings, it is already concluded that the Defendants are already in trespass and to grant this application would be to undermine and defeat the purpose of the trial of this suit wherein this Court has been called upon to determine one way or the other if the 1st Defendant has acted in trespass and if so, to make a declaration to that effect.

He relied on the case of *Registered Trustees of Ugborodo Community Trust & 4 ors V. Mr. Wellington Ojogor & 19 ors (2014) 46 WRN 148 at 167.*

He posited that it will be impossible to grant this application without first agreeing with the Claimant/Applicant that the defendants are trespassers which the Court cannot do at this stage.

Again, he posited that the Claimant is praying that the Defendants be restrained from carrying out further developmental activities on the land in dispute whereas the Claimant/Applicant has not shown by his affidavit that the Defendants have carried out developmental activities on the entire land in dispute.

He pointed out that the Defendants have shown that the activities of the Defendants were restricted to only a portion of the land which measures 50 feet by 100feet (and that those activities have been long concluded). He said that the

Claimant/Applicant has not demonstrated that the Defendants are carrying out any activity on the other half (50 feet by 100feet) of the land whereas his prayer is for the entire land. He posited that orders of Court are not granted as of course neither can the court begin to determine what part of the land in question the Order sought should apply to. He urged this honourable Court to refuse this application as it is only an invitation to pick and choose what portion of the land the Order should apply to. He said that granting it would be prejudicial to the determination of the main suit which is yet to commence.

ISSUE 2:

Whether the Claimant/Applicant has satisfied the conditions for a grant of an order of interlocutory injunction.

Counsel submitted that the general principles upon which a court would predicate the grant or refusal of an application for interlocutory injunction as this was laid down in the cases of ***OBEYA MEMORIAL HOSPITAL V. A-G., FEDERATION (2000) 24 WRN 138; (1987) 3 NWLR (pt. 60) 352; (2004) All EWL (pt. 232) 1580, AFRO CONTINENTAL V. AYANTUYI (1995) 12 SCNJ 12; ABDULAH V. GOVERNOR OF LAGOS STATE (1989) 1 NWLR (pt.97) 356 and AKAPO V. HAKEEM-HABEEB (1992) 6 NWLR (pt. 247) 266; (1992) 7 SCNJ 143.***

He posited that some of these principles which must be satisfied by the applying party are as follows:

- a. The applicant must show that the balance of convenience is in favour of the grant of his application;***
- b. The applicant must show that his conduct is not reprehensible and that there was no delay on his part in bringing the application; and***
- c. That damages cannot adequately compensate her for the injury she would suffer if the application is not granted and the case is subsequently decided in her favour.***

He submitted that the Claimant has failed to satisfy these basic requirements. That his attempts to show the necessary facts are such that this honourable court cannot place reliance on. He said that it does not lie in the mouth of any other but the person claiming to be affected by the activities of the Defendants to say whether or not he can be adequately compensated by damages if his application for an interlocutory injunction is refused and judgment is subsequently entered in his favour.

Again he posited that only the person to be affected can say whether or not the balance of convenience is in his favour or not as he alone understands best the

attachment he shares with the res and its value to him (if any). He therefore submitted that the Claimant/Applicant's attempt to satisfy the conditions for the grant of this application as contained in paragraph 23 (a) – (e) of the Claimant/Applicant's supporting affidavit are at best very weak and unconvincing and he urged the Court to so hold.

Shortly after filing their Counter Affidavit and written address, the Defendants filed a Further and Better Counter Affidavit in opposition to the Motion and a Further Written Address of counsel.

In the further written address, the learned counsel reiterated that the Claimant/Applicant has failed to establish the existence of a legal right over the land. He posited that the Defendants/Respondents have shown through the Counter affidavit and the Further and Better Counter affidavit filed that this Motion was filed before the sharing of the properties of the father of the Claimant and the 2nd Defendant. He submitted that the Claimant's claim of a right over the land was preemptive, whereas, the Defendants/Respondents, have satisfactorily shown that the 1st Defendant has a legal right over a part of the land measuring 50 feet by 100feet, same having been sold to him by the Aisowieren family based on a decision which the Claimant partook in.

The most important pre-condition to be proved by the Claimant/Applicant is the existence of a legal right over the land in question which is threatened and ought to be protected. See the following cases- Ojukwu V. Governor of Lagos State (1986) 3 NWLR (Pt 26) 39; Akapo V. Hakeem Habeeb (1992)6 NWLR (Pt 247) 266-289.

He posited that a joint consideration of Exhibits 2 and 3 puts the balance of convenience on the defendants especially the 1st defendant and also established the existence of a legal right in his favour as opposed to the Claimant. He submitted that the Claimant/Applicant, been aware of the family's decision to sell off a part of the entire land of 100feet by 100feet, has brought this application in bad faith over the entire land, knowing fully well of the family's decision to transfer title over half of the land to a third party.

He urged the Court to discountenance the Claimant/Applicant's motion and arguments in support of same and strike out the Motion.

Upon receipt of the Defendants Further and Better Counter Affidavit in opposition to the Motion and the Further Written Address of their counsel, the Claimant/Applicant filed a further affidavit in support of the motion.

In the further affidavit the Claimant stated inter alia that the purported sharing of his late father's Estate by the 3rd – 6th Defendants and the sharing documents attached by the Defendants to their Counter Affidavit was done during the pendency of this suit.

He stated that the 3rd – 6th Defendants are not the proper persons under the Bini Native Law and Custom to share the Estate of his late father.

He also stated that the purported sale of a part of House No. 9, Nitel Road, Off Sapele Road, Benin City by the 3rd – 6th Defendants is incurably defective.

He maintained that his legal right to inherit from his late father's Estate as the Eldest son from the second gate (urho) and to institute this action to protect same is guaranteed under the Bini Native Law and Custom on Inheritance as encapsulated in A HANDBOOK ON SOME BENIN CUSTOMS AND USAGES ISSUED BY THE BENIN TRADITIONAL COUNCIL ON THE AUTHORITY OF THE OMO N'OBA EREDIAUWA, OBA OF BENIN.

He informed the Court that the document titled RESOLUTION OF MEETING HELD ON THE 2ND DAY OF OCTOBER, 2021 AT NO. 2, AISOWERIEN CLOSE and attached to the Defendants Further Affidavit was made for the purpose of this case and there is nowhere in the said document bearing his signature.

He stated that the Interim Injunction granted in this cause has brought relative peace to his mother and siblings who still reside in the property and eased the apprehension that the bulldozers may roll in any time.

He said that during the pendency of the present suit, parties should maintain the status quo in line with the doctrine of *Lis Pendis*.

That if an Interlocutory Injunction is not granted in this cause, the 1st Defendant would unleash a barrage of violence and destruction against his mother, his siblings and himself as he has control of the use of thugs and the present ability to effect his purpose of violently taking over the property now in dispute and which is the subject matter of the present suit and application.

I have carefully examined all the processes filed in this application together with the arguments of counsel on the matter.

An application for interlocutory injunction seeks a discretionary remedy. It is settled law that all judicial discretions must be exercised judicially and judiciously. The essence of an interlocutory injunction is the preservation of the *status quo ante bellum*. The order is meant to forestall irreparable injury to the applicant's legal or equitable right. See the following decisions on the point: *Madubuike vs. Madubuike (2001) 9NWLR (PT.719) 689 at 709; and Okomu Oil Palm Co. vs. Tajudeen (2016) 3NWLR (Pt.1499)284 at 296*.

The principal factors to consider in an application for interlocutory injunction are as follows:

- I. The applicant must establish the existence of a legal right;
- II. That there is a serious question or substantial issue to be tried;
- III. That the balance of convenience is in favour of the applicant;
- IV. That damages cannot be adequate compensation for the injury he wants to prevent;

V. That there was no delay on the part of the applicant in bringing the application; and

VI. The applicant must give an undertaking to pay damages in the event of a wrongful exercise of the Court's discretion in granting the injunction.

See also, the following decisions on the point: *Kotoye v C.B.N. (1989) 1 NWLR (Pt.98) 419*; *Buhari v Obasanjo (2003) 17 NWLR (Pt.850) 587*; and *Adeleke v Lawal (2014) 3 NWLR (Pt.1393) 1at 5*.

Therefore, the issue for determination in this application is whether the Applicant has satisfied the above enumerated conditions to warrant the exercise of the discretion of this Court in his favour.

The most important pre-condition is for the applicant to establish that he has a legal right which is threatened and ought to be protected. See: *Ojukwu vs Governor of Lagos State (1986) 3 NWLR (Pt.26) 39*; *Akapo vs Hakeem Habeeb (1992) 6 NWLR (Pt.247) 266-289*.

From the exchange of affidavits it is an undeniable fact that the Claimant/Applicant is the Senior Son from the second gate (urho) of the Late Pa. Alfred Omoregie Aisowieren.

In this suit the Claimant/Applicant is seeking to enforce his right as a potential beneficiary of the estate of his deceased father against the Defendants who he allege are trying to rob him of those rights by disposing of the property in dispute to which he is seriously laying claim to.

In their counter affidavits and written address of their counsel, the Defendants/Respondents are seriously contending that the Applicant has no legal right to protect because the property in dispute has been sold to the 1st Defendant allegedly with the consent of all the family members including the Claimant.

With respect to the assertion that the disputed property has been transferred to the 1st Defendant under a valid transaction, I am of the view that it is premature to make any such finding at this stage. The Law is settled that in dealing with any interlocutory application the Court should not delve into the substantive issues. A Court must avoid the determination of a substantive issue at an interlocutory stage. It is never proper for a court to make pronouncement in the course of interlocutory proceedings on issues capable of prejudging the substantive issues before the Court. See the following decisions on the point: *Consortium MC v NEPA (1992) NWLR (Pt.246) 132*, *Barigha v PDP & 2 Ors (2012) 12 SC (Pt.v) 1*, *Mortune v Gimba (1983) 4 NCLR 237 at 242*.

From the available evidence, I think the Applicant has identified his legal rights which he seeks to protect as a beneficiary of his deceased's father's estate. I am of the view that at this stage, the Claimant/Applicant has adduced sufficient

evidence to establish the fact that he has some legal rights to protect in relation to the issues to be determined in the substantive suit.

On the second condition of having a serious question or substantial issue to be tried, I am guided by the dictum of the Court in the case of: *Onyesoh vs Nze Christopher Nnebedun & Others (1992) 1 NWLR (Pt.270) 461 at 462*, where it was re-emphasized that:

“It is not the law that the applicant must show a prospect of obtaining a permanent injunction at the end of the trial. It is sufficient for the applicant to show that there is a serious question between the parties to be tried at the hearing.”

Also, in the case of: *Ladunni vs. Kukoyi (1972) 1 All NLR(Pt.1) 133*, the Court opined that: ***“...when a Court considers an application for interlocutory injunction, it is entitled to look at the whole case before it, all the circumstances which may include affidavit evidence, judgments or pleadings if these have been filed. All these show what is in the dispute between the parties”***.

From the facts disclosed in the affidavit and counter-affidavit it is evident that there are substantial issues to be tried in the substantive suit in relation to the rights of the Claimant over the disputed property, whether the property has been sold and the validity of the purported sale of the property.

On the balance of convenience, the applicant must show that the balance of convenience is on his side. In the classical case of: *Kotoye v C.B.N. (1989) 1 NWLR (Pt.98) 419*, the Supreme Court explained that the applicant must establish that more justice will result in granting the application than in refusing it.

Presently, the Applicant is apprehensive that if this application is not granted and the Respondents are allowed to continue their alleged acts of trespass on the land, the Claimant, his siblings and his aged mother who are presently residing in the property may be in jeopardy. He alleged that the Interim Injunction earlier granted in this suit has brought relative peace to his mother and siblings who still resides in the property and eased his apprehension that the bulldozers may roll in at any time.

Going through the Respondents’ Counter-Affidavit I observed that they dwelt mainly on the fact that part of the land has been sold to the 1st Defendant, they did not state what they would suffer if this interlocutory injunction is granted pending the determination of the substantive suit.

I am of the view that at this stage from the available evidence, the balance of convenience tilts in favour of the Applicant.

Next is on the requirement of inadequacy of damages. In the case of: *American Cyanamid Co. vs Ethicon Ltd. (1975) 1 ALL E.R. at 504 pp. 510*, the English court stated the position thus:

“If damages ...would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage”

From the affidavit evidence adduced by the Claimant/Applicant, the Applicant has shown that he cannot be adequately compensated by the award of damages if the Defendants are allowed to continue in their act of wanton trespass and decimation of one of the ancestral homes of his late father which he claims he is customarily entitled to inherit. The evidence revealed that the Defendants have introduced a wall fence right at the middle of the compound to alter the topography of the land. I agree with the Claimant that where there exists a threat to the radical alteration or structural character or topography of a land, an order of interlocutory injunction will be appropriate in the circumstances to maintain the status quo pending the final determination of the competing rights of the parties.

On the condition of whether the Applicant was prompt in bringing the application, I observed that this application was filed along with the originating processes in this suit so I do not think there was any delay on the part of the Applicant in filing this application.

Finally, on the requirement of an undertaking to pay damages in the event of a wrongful exercise of the Court’s discretion in granting the injunction, I observed that in paragraph 24 of the supporting affidavit, the Claimant/Applicant gave an undertaking to pay damages to the Defendants if at the end, this application is one which ought not to have been granted.

On the whole, I am satisfied that the Applicant has fulfilled the requirements to enable this court exercise its discretion to grant this application.

Consequently, this application succeeds and I hereby order as follows:

An Order of Interlocutory Injunction restraining the Defendants/Respondents, their agents, servants and or privies or howsoever called from further trespassing on or carrying out any developmental activities whatsoever or altering the structural character or topography or exercising any form of possessory rights over the property with the structures thereon, on a parcel of land measuring approximately 100 feet by 100 feet, lying and situate at No. 9, Nitel Road, Off Sapele Road, Benin City, pending the hearing of the substantive suit.

I award the sum of N50, 000.00 (fifty thousand naira) as costs in favour of the Claimants/Applicants.

**P.A.AKHIHIERO
JUDGE
26/05/2022**

COUNSEL:

PRINCE C. B. OGIEGBAEN-----CLAIMANT/APPLICANT

S.I.OKOROR ESQ-----DEFENDANTS/RESPONDENTS